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REDACTED VERSION*

Matter of: Florida Professional Review Organization, Inc.--Advisory Opinion

File: B-253908.2

Date: January 10, 1994

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Lisa S. Mankofsky, Esq., and Charles J. Steele, Esq., Foley & Lardner, for Florida Medical Quality Assurance, Inc., an interested party.
Lloyd M. Weinerman, Esq., and Jonathan A. Baker, Esq., Department of Health and Human Services, for the agency.
Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. A procuring agency is not required to suspend performance of a contract under the Competition in Contracting Act of 1984, where the agency did not receive notice from the General Accounting Office (GAO) within 10 calendar days of the date of award that a protest had been filed with GAO.

2. In a procurement for Medicare Program peer review services under which contracts can only be awarded to eligible physician-sponsored or physician-access organizations, a procuring agency may not reasonably rely upon an offeror's certification of eligibility where it has reason to believe that the certification may be inaccurate.

3. The protester is not entitled to the solicitation's evaluation preference for physician-sponsored, peer review organizations, where the agency reasonably did not rely upon the protester's certification of eligibility as a physician-sponsored organization because the protester's certificate was facially defective and the protester did not demonstrate its claimed status, despite the agency's specific request to do so during discussions.

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*The decision issued January 10, 1994, contained confidential or source selection sensitive information, and was subject to a United States District Court protective order. This version of the decision has been redacted. Deletions in text are indicated by "[deleted]."

4. The General Accounting Office does not recommend disturbing an award of a contract for Medicare Program peer review services, notwithstanding the awardee's proposal's failure to indicate that it had an arrangement with one physician in "every generally recognized specialty," as required by applicable regulations to be eligible to receive such a contract, where the record otherwise evidences the existence of such an arrangement and the protester is not prejudiced because its proposal did not evidence arrangements with physicians in "every generally recognized specialty."

5. The procuring agency reasonably did not credit the protester's asserted "cost savings" in the agency's evaluation of the protester's proposed costs where the protester did not make a firm commitment to achieve these savings.

6. The government is not required to equalize competition with the respect to the advantage that an incumbent may have or to exclude an incumbent from the competition, as long as that advantage does not result from unfair action by the government.

DECISION

The United States District Court for the District of Columbia requests an advisory opinion of the General Accounting Office (GAO) with respect to the complaint of Florida Professional Review Organization, Inc. (FPRO)[1] requesting declaratory and injunctive relief, concerning the award of a cost-reimbursement contract to Florida Medical Quality Assurance, Inc. (FMQA).[2] The contract was awarded under request for proposals (RFP) No. HCFA-93-007/GB, issued by the Health Care Financing Administration (HCFA), Department of Health and Human Services, for the operation of a utilization and quality control peer review organization in the State of Florida.

FPRO contends that HCFA improperly failed to acknowledge and credit FPRO's preferred status as a physician-sponsored organization; that FMQA is not eligible to receive a contract award under the applicable laws and regulations

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[1]FPRO is a Florida corporation. The sole shareholders of FPRO are the Keystone Peer Review Organization, Inc., a wholly owned subsidiary of the Pennsylvania Medical Society, and Florida Medical Association, Inc. The record indicates that Keystone is FPRO's principal shareholder.

[2]FMQA is a wholly owned subsidiary of Alabama Quality Assurance Foundation, Inc. (AQAF).

since it is neither a physician-sponsored nor a physician-access organization; that HCFA unreasonably evaluated FPRO's and FMQA's proposed costs; that HCFA unfairly allowed FMQA to compete for award even though AQAF, FMQA's parent corporation, was an incumbent contractor; and that HCFA improperly did not suspend FMQA's contract performance when FPRO protested the award.

In accordance with the court's request for an advisory opinion, the parties provided us with a copy of the administrative record and pleadings filed with the court. The parties also submitted arguments to us concerning the record.[3]

As described below, we have no basis to question the agency evaluation or source selection decision. Specifically, we conclude that HCFA reasonably determined that FPRO did not demonstrate that it was a physician-sponsored organization; that HCFA reasonably determined that FMQA was an eligible physician-access organization; that HCFA reasonably evaluated the offerors' proposed costs; that HCFA reasonably allowed FMQA to compete for award under the contract; and that HCFA was not required to suspend FMQA's contract performance.

BACKGROUND

The Medicare Program, as established by the Social Security Act, provides for the payment of medical care for eligible aged and disabled persons. 42 U.S.C. § 1395 et seq. (1988). The Social Security Act, as amended by the Peer Review Improvement Act of 1982, requires the Secretary of Health and Human Services to contract with utilization and quality control peer review organizations for peer review services. 42 U.S.C. § 1320c-2. These peer review services include determining whether Medicare Program medical services are reasonable, medically necessary and allowable under applicable law; whether the quality of such services meets professionally recognized standards of health care; and whether services and items, which are proposed to be provided in a hospital or other health care facility on an in-patient basis, can be more economically and effectively provided on an out-patient basis or in a different type of in-patient health care facility. 42 U.S.C. § 1320c-3(a); 42 C.F.R. § 466.71(a) (1992).

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[3]FPRO's and FMQA's counsel have received protected material and information, subject to the terms of a Protective Order issued by the District Court. Our decision is based in part upon protected information.

The Peer Review Improvement Act, as implemented by the agency's regulations, provides that only physician-sponsored or physician-access organizations may receive peer review contracts, and that physician-sponsored organizations should be given a preference over physician-access organizations. 42 U.S.C. § 1320c-2(b)(1); 42 C.F.R. §§ 462.101, 462.102(d). A physician-sponsored organization is one that is not a health care facility, health care facility association, or health care facility affiliate[4] and is:

> "composed of a substantial number of the licensed doctors of medicine and osteopathy practicing medicine or surgery in the area and who are representative of the practicing physicians in the area."

42 U.S.C. § 1320c-1(1)(A); see 42 C.F.R. § 462.102(a)(1). To satisfy the "substantial number of . . . licensed doctors" requirement, a potential physician-sponsored organization "must state and have documentation in its files showing that it is composed of at least 10 percent of the licensed doctors of medicine and osteopathy practicing medicine in the review area." 42 C.F.R. § 462.102(b).

A physician-access organization is defined to be one that is not a health care facility, health care facility association or health care facility affiliate, and has:

> "available to it, by arrangement or otherwise, the services of a sufficient number of licensed doctors of medicine or osteopathy engaged in the practice of medicine or surgery in [the] area to assure that adequate peer review of the services provided by the various medical specialties and subspecialties can be assured."

42 U.S.C. § 1320c-1(1)(B); see 42 C.F.R. § 462.103(a)(1). The regulations provide that a potential physician-access organization satisfies the "sufficient number of . . . doctors" requirement if it demonstrates:

> "(1) [t]hat it has available to it at least one physician in every generally recognized specialty;[5] and

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[4]"Health care facility" and "health care facility affiliate" are defined in the statute and regulations. 42 U.S.C. § 1320C-2(b)(3)(B); 42 C.F.R. §§ 462.1, 462.105.

[5]"[G]enerally recognized specialty" is not defined in the statute or regulations.

> "(2) [t]he existence of an arrangement or arrangements with physicians under which the physicians would conduct review for the organization."

42 C.F.R. § 462.103(b).

SOLICITATION AND AWARD

Until April 15, 1992, peer review services in Florida were provided under a contract with Professional Foundation for Health Care, Inc.[6] On April 15, HCFA terminated Professional Foundation's peer review contract for default. HCFA entered into interim peer review contracts with Blue Cross and Blue Shield of Florida for review of healthcare providers other than health maintenance organizations (HMO) and with FMQA's parent organization, AQAF, for peer review of HMOs.

On October 13, 1992, HCFA issued this RFP, which contemplates the award of a cost-plus-fixed-fee contract for comprehensive peer review services in Florida.[7] Offerors were informed that award would be made to the responsible offeror, whose conforming offer was the most advantageous to the government, considering technical merit and cost. Technical evaluation factors and their respective numerical weights were stated in the RFP, and technical merit was stated to be more important than cost. The solicitation also provided that physician-sponsored organizations would receive an evaluation preference of an additional 5 points in the technical evaluation.

Offerors were also informed that to be considered for award they must certify their compliance with the eligibility requirements of the Peer Review Improvement Act, as implemented by the regulations. Specifically, the RFP stated that:

> "[a]ny offeror not meeting the eligibility requirements during the proposal evaluation process may not be considered further, i.e., the

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[6]On September 6, 1991, HCFA issued a request for proposals to provide peer review services in Florida. After three offerors, including FPRO, submitted offers, the agency canceled the solicitation because it determined that the solicitation did not reflect its actual needs.

[7]Shortly after the issuance of the RFP, HCFA informed FPRO that the contractors performing the Florida peer review services on an interim basis, which included AQAF, would be allowed to compete for the follow-on contract.

> organization may be considered ineligible for a contract to perform review. Any offeror selected must meet all eligibility requirements as of the contract date."

The RFP provided that the peer review contractor must remain in compliance with the eligibility requirements and notify the contracting officer if it fails to remain in compliance.

A detailed statement of work and proposal preparation instructions were included in the RFP. In pertinent part, the RFP required offerors to state "the number and types (including specialty, site or practice, i.e., rural or urban) of physician reviewers available to make [peer review organization] determinations."

Offerors were required to provide all property or equipment necessary for contract performance, but the RFP stated that government-owned or furnished property may be provided. Offerors were to provide in their proposals a description and estimated cost of all property and equipment required for contract performance and to state whether the offeror would furnish the equipment or acquire it during the contract. Since some of the potential competitors held prior contracts, offerors were also required to identify all government-owned property in their possession that was proposed for use in contract performance.

Three proposals, including those of FPRO and FMQA, were received by the closing date for the receipt of proposals. FPRO certified that it was a physician-sponsored organization, but not a physician-access organization. In its physician-sponsored organization certificate, FPRO stated that:

> "There are 16,500 licensed doctors of medicine and osteopathy practicing medicine or surgery in the review area. There are 1,200* licensed doctors of medicine and osteopathy practicing medicine or surgery in the review area that are members of the offeror's organization.
>
> "*1,200 physicians have expressed interest in becoming FPRO reviewers."[8]

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[8]FPRO stated elsewhere in its proposal that Florida Medical Association, one of its two corporate shareholders, was the "largest physicians' organization in the State which has more than 16,000 members. Since the formation of FPRO in late 1991, more than 1200 Florida physicians have expressed interest in becoming physician reviewers." [Emphasis in original.]

FMQA certified that it was a physician-access organization, but not a physician-sponsored organization. In its physician-access certificate, FMQA stated that there were 39,324 licensed doctors of medicine and osteopathy practicing medicine or surgery in the review area, and that 138 licensed doctors of medicine or osteopathy in the review area were members of FMQA's organization. FMQA also stated in its technical proposal that it:

> "has documentation in its files, and in Attachment 8 [to its proposal] which confirms that it has 138 practitioners (doctors of medicine, osteopathy, dentistry and podiatry, and also optometrists and chiropractors) available to provide the services necessary to assure peer review."

FMQA was determined to be eligible as a physician-access organization, although one agency evaluator noted in his evaluation that FMQA did not provide a "[g]ynecology specialist in its physician reviewers". FPRO, notwithstanding its physician-sponsored organization certification, was determined by HCFA to have not adequately documented its status as a physician-sponsored organization because, in the agency's view, FPRO failed to provide a realistic estimate of the number of physicians practicing in Florida and the number of physicians endorsing its proposal.[9] In the agency's evaluation and source selection, the agency assumed that FPRO was an eligible physician-access organization.

FPRO's and FMQA's proposals were evaluated as being technically unacceptable but susceptible of being made acceptable. HCFA evaluated the third offeror's proposal as unacceptable and requiring a major revision to become acceptable. The offerors' initial proposals were evaluated as follows:

Offeror	Score (Of 64 Pts.)	Total Costs	Fee
FMQA	[deleted]	[deleted]	[deleted]
FPRO	[deleted]	[deleted]	[deleted]
Offeror A	[deleted]	[deleted]	[deleted]
Government Estimate		[deleted]	[deleted]

[9]HCFA states that it was informed by Blue Cross/Blue Shield of Florida that Blue Cross had approximately 40,000 Florida physicians listed in its files.

On this basis, FPRO's and FMQA's proposals were included in the competitive range while the third offeror's proposal was rejected.

Pre-award audits of FMQA's and FPRO's initial proposed costs were conducted by the agency's Office of Inspector General. Among other things, FMQA's estimating and accounting system was determined to be adequate.

Discussions were conducted with both FPRO and FMQA. Among other things, FPRO was requested to "submit further evidence to support your claim of physician-sponsored organization status." In its discussions with FMQA, the agency did not inform FMQA that it had failed to provide for a gynecologist in its list of reviewing physicians.[10]

Technical proposal revisions were received from FPRO and FMQA. In response to the agency's request for evidence to support FPRO's claim to be a physician-sponsored organization, FPRO submitted an attorney opinion letter of its Pennsylvania counsel that stated that since FPRO was owned in part by Florida Medical Association, which assertedly represents a majority of the licensed medical doctors practicing medicine and surgery in the State of Florida, and was "endorsed and supported by the Florida Osteopathic Association which [allegedly] represents a majority of the doctors of osteopathy practicing medicine or surgery in the State of Florida," FPRO qualified as a physician-sponsored organization. The agency did not consider this letter to be sufficient documentation to establish that FPRO qualified as a physician-sponsored organization under the applicable regulations.

FMQA's revised proposal received [deleted] points of a possible 64 technical points, while FPRO's revised proposal received [deleted] points. While both proposals were determined to be technically acceptable, the agency found that FMQA's higher point score reflected FMQA's better understanding of the contract requirements as well as its superior proposal.

Best and final offers (BAFO) were requested from FPRO and FMQA, and as a part of this request, the offerors were required to provide an "Implementation and Start-Up Activities Plan" that would inform the agency of the offerors' strategy in implementing the contract. Among other things, offerors were required to address the

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[10]The contracting officer states that he did not consider the lack of a gynecologist to be a proposal deficiency but only a proposal "weakness" that need not be raised during discussions.

following question in their plans: "[d]o you have sufficient [physician] reviewers lined-up and ready, e.g., Letters of Intent?" The offerors were informed that the plan would not be point scored but may be used by the source selection official (SSO) as a tie-breaker in the event that the proposals were determined to be essentially equal.

BAFOs were received from FPRO and FMQA, and the agency determined that the offerors made no substantial changes to their revised technical proposals. Accordingly, FPRO's and FMQA's revised technical point scores did not change. FMQA's BAFO was again determined to be superior to FPRO's and to reflect FMQA's better understanding of the contract work. In addition, the agency did not find any significant differences between the offerors' proposed start-up plans, both of which were determined to be adequate. FMQA's and FPRO's BAFO cost-plus-fixed-fees, as accepted by the agency, were as follows:

	Total Costs	Fee	Cost Plus Fee
FMQA	[deleted]	[deleted]	$26,038,823
FPRO	[deleted]	[deleted]	[deleted]

The SSO decided that FMQA should receive award as the offeror, whose offer was the most advantageous to the government, since it had the higher technical score and a lower cost and fee. Specifically, the SSO stated:

> "I select [FMQA] for award of the contract to provide the services described in [the] RFP . . . primarily based on their superior technical proposal. I have also taken into account FMQA's significantly lower final offered cost plus fee. In fact, not only did FMQA offer a total estimated cost almost [deleted] below that offered by FPRO, but they also proposed a fixed fee that was more than [deleted] lower than that proposed by FPRO. The difference in fee is especially significant because that represents a definite savings to the [g]overnment, whereas under a cost type contract the difference in estimated costs may or may not materialize. Therefore, the technical panel's recommendation of FMQA, as supported by the explanation of the technical differences, together with FMQA's [deleted] lower estimated cost and [deleted] lower fee, combine to make award to FMQA in the overall best interest of the [g]overnment consistent with the stated award criteria of the [RFP]."

Award was made to FMQA on June 17, 1993, and FPRO protested to GAO on June 25. The agency did not suspend contract performance as requested by FPRO. FPRO's suit for declaratory and injunctive relief was filed in the United States District Court on July 6. Since there was no indication that the court expected or was interested in our decision, we dismissed FPRO's protest.[11] The court subsequently requested our opinion on FPRO's complaint.

STAY OF CONTRACT PERFORMANCE

FPRO complains that HCFA improperly failed to suspend performance of FMQA's contract because FPRO protested the contract award to GAO and the agency had actual notice of the protest within 10 calendar days of the date of award.

The Competition in Contracting Act of 1984 (CICA) provides that where an agency receives notice of a protest filed with the GAO within 10 days of the date of contract award, the agency must suspend performance of the contract while the protest is pending, unless the head of the procuring activity authorizes contract performance.[12] 31 U.S.C. § 3553(d); 4 C.F.R. § 21.4(b). To trigger the CICA provision which requires that an agency suspend performance of a contract award, an agency must receive notice from GAO within 10 calendar days of award that a protest has been filed. Survival Tech., Inc. v. Marsh, 719 F. Supp. 18 (D.D.C. 1989). Notice to an agency from a protester that it has filed a protest with GAO is not sufficient to trigger the CICA stay provisions. Information Resources, Inc v. United States, 676 F. Supp. 293, 296 (D.D.C. 1987). CICA provides that GAO will notify an agency of a protest within 1 working day of receipt. 31 U.S.C. § 3553(b)(1); 4 C.F.R. § 21.3(a).

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[11]It is our policy not to decide protests where the matter involved is the subject of litigation before a court of competent jurisdiction unless the court requests our decision. 4 C.F.R. § 21.9(a) (1993); Robinson Enters.--Recon., B-238594.2, Apr. 19, 1990, 90-1 CPD ¶ 402.

[12]The head of the procuring activity may authorize award and contract performance if he determines in writing that performance of the contract is in the government's best interest, or that there are urgent and compelling circumstances significantly affecting the interests of the United States which will not permit the agency to await GAO's decision. 4 C.F.R. §§ 21.4(b)(1), (2).

Here, contract award was made to FMQA on June 17. FPRO filed its protest with our Office on Friday, June 25, at 5:15 p.m. In accordance with CICA, we notified the agency of FPRO's protest on Monday, June 28, at 10:10 a.m., within 1 working day of our receipt of the protest. Since the agency did not receive our notice of the FPRO's protest until 11 calendar days after award, the agency was not required to suspend performance of the contract. BDM Mgmt. Servs. Co., B-225287, Feb. 1, 1988, 88-1 CPD ¶ 93.

FPRO'S PHYSICIAN-SPONSORED CERTIFICATION

FPRO complains that the agency unreasonably rejected FPRO's certification of its status as a physician-sponsored organization and thus failed to give FPRO the 5-point technical evaluation preference provided for by the RFP. FPRO states that its corporate shares are wholly owned by Keystone and Florida Medical Association, and that "[Florida Medical Association] represents the majority of the licensed medical doctors practicing medicine and surgery in the State of Florida." On this basis, FPRO contends that it satisfied the physician-sponsored organization requirement of being composed of at least 10 percent of the licensed doctors of medicine and osteopathy practicing medicine in the Florida review area.

HCFA argues that FPRO's initial proposal did not demonstrate that FPRO was composed of at least 10 percent of the licensed physicians in Florida to qualify as a physician-sponsored organization. Specifically, HCFA notes that FPRO certified that there were only 16,500 licensed doctors of medicine and osteopathy in Florida, when actually there are approximately 40,000 licensed physicians in Florida, and that FPRO only certified that 1,200 physicians had "expressed interest in becoming FPRO reviewers." HCFA states that this discrepancy called into question whether FPRO's organization was composed of at least 10 percent of Florida's licensed physicians. HCFA thus requested during discussions that FPRO provide evidence demonstrating its eligibility as a physician-sponsored organization. However, FPRO only provided an attorney opinion letter restating the offeror's opinion that it was so eligible.

An agency may generally rely upon an offeror's representations that it is a physician-sponsored organization. Louisiana Physicians for Quality Medical Care, Inc., 69 Comp. Gen. 6 (1989), 89-2 CPD ¶ 316; Empire State Medical, Scientific and Educ. Found., Inc., B-238012, Mar. 29, 1990, 90-1 CPD ¶ 340 (reasonable reliance on offerors' certifications of physician-sponsored status). However, where, as here, an agency has reason to question the accuracy of a representation as to an offeror's status or eligibility, it may not reasonably accept the

representation without verifying its accuracy. See e.g., SeaBeam Instruments, Inc., B-253129, Aug. 19, 1993, 93-2 CPD ¶ 106 (certification that offered product was domestic as required by an appropriations act); General Sales Agency, B-247529.2, Aug. 6, 1992, 92-2 CPD ¶ 80 (certification that there was no contingent fee); Autospin, Inc., B-233778, Feb. 23, 1989, 89-1 CPD ¶ 197 (Buy American Act certification).

As noted above, FPRO's representation that it was a physician-sponsored organization was flawed on its face because it suggested that FPRO was not composed of at least 10 percent of the licensed physicians in Florida as is required to obtain this preferred status--instead the proposal only stated that 1,200 physicians had indicated an interest in being physician reviewers for FPRO; this does not indicate the number of physicians that are members of the protester's organization. Significantly, when the agency asked FPRO for "evidence" to support its claimed status as a physician-sponsored organization, FPRO simply provided an attorney's opinion letter that asserted that the membership of Florida Medical Association and FPRO were co-extensive, and therefore FPRO's membership was composed of a majority of the physicians practicing medicine in Florida. Despite this assertion, there is no evidence in FPRO's proposal or BAFO that the members of Florida Medical Association, a corporate entity, are members of FPRO, a separate corporate entity of which Florida Medical Association is the minority stockholder. Given FPRO's failure in response to the agency's specific discussions to provide information supporting the offeror's claimed physician-sponsored status, we think the agency reasonably determined that FPRO was not a physician-sponsored organization. See Patricia A. Gehringer, B-247562, June 11, 1992, 92-1 CPD ¶ 511.

FMQA'S PHYSICIAN-ACCESS ELIGIBILITY

1. Duty to Investigate Certificate

FPRO next complains that FMQA was not eligible at the time of award to receive the peer review contract. FPRO contends that while FMQA certified in its proposal that it was a physician-access organization, FMQA did not have written arrangements with a sufficient number of physicians to perform the contract work, nor did it have available at least one physician in "every generally recognized specialty" as required by the agency's regulations.

HCFA and FMQA contend that the agency could reasonably accept FMQA's certificate of compliance with the eligibility requirements in the absence of evidence demonstrating that FMQA would not satisfy the eligibility requirements. In

this regard, HCFA argues that the determination of whether FMQA actually satisfies the eligibility requirements concerns the agency's affirmative determination of FMQA's responsibility,[13] which should not be questioned absent a showing that the determination was made fraudulently or in bad faith or that definitive responsibility criteria in the solicitation were not met. See 4 C.F.R. § 21.3(m)(5); King-Fisher Co., B-236687.2, Feb. 12, 1990, 90-1 CPD ¶ 177.[14]

FPRO responds that the agency could not simply accept FMQA's proposal certification because the eligibility requirements actually constitute definitive responsibility criteria and the agency's determination that an offeror satisfies these definitive responsibility criteria must be reviewed to determine whether the agency's determination is supported by "adequate and objective" evidence.[15] See T Warehouse Corp., B-248951, Oct. 9, 1992, 92-2 CPD ¶ 235. FPRO argues that in any event FMQA's proposal failed to show that it had an arrangement with a gynecologist, which involves a "generally recognized specialty," and FMQA therefore does not qualify as a physician-access organization.

The eligibility requirements of the Peer Review Improvement Act, as implemented by the agency's regulations and RFP, are not matters of an offeror's general responsibility nor are they definitive responsibility criteria. These requirements do not concern the prospective contractors' ability and capacity to perform the contract, as judged by either general responsibility or definitive responsibility criteria, but are eligibility requirements that define the legal status required of a prospective contractor to receive

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[13]Responsibility refers to a prospective contractor's apparent ability or capacity to perform all contract requirements. See Federal Acquisition Regulation Part 9.

[14]Such determinations that an offeror is capable of performing a contract are not generally subject to review because they are based in large measure on subjective judgments which generally are not susceptible to reasoned review. King-Fisher Co., supra.

[15]Definitive responsibility criteria are specific and objective standards (such as a minimum period of prescribed experience), which are established by an agency for use in a particular procurement to measure an offeror's ability to perform the contract. See Acurex Corp., B-235746, Sept. 29, 1989, 89-2 CPD ¶ 298.

award under the Act. See Empire State Medical Scientific and Educ. Found., Inc., supra (certification of physician-sponsored status); see also Merrick Eng'g, Inc., B-238706.2, June 14, 1990, 90-1 CPD ¶ 564 (bidder's certification of Walsh-Healey Public Contracts Act status does not concern definitive responsibility criterion but is matter of eligibility).

As stated above with regard to an offeror's certification of physician-sponsored status, an agency may reasonably rely in its evaluation upon an offeror's certifications and proposal representations, unless there is reason to believe that the certifications or representations are inaccurate. Empire State Medical Scientific and Educ. Found., Inc., supra; see E.D.I., Inc., B-251750; B-252128, May 4, 1993, 93-1 CPD ¶ 364 (reasonable reliance on an offeror's certification of compliance with Trade Agreements Act restrictions). However, as was the case with FPRO's physician-sponsored certification, where there is information that indicates that an offeror's certification or proposal representations are inaccurate, an agency must go beyond the offeror's self-certification or representation in its evaluation. SeaBeam Instruments, Inc., supra (certification of compliance the Appropriations Act domestic manufacture restriction may not be accepted where proposal suggests noncompliance); General Sales Agency, supra (contingent fee certification may not be accepted without further investigation if evidence is advanced prior to award that the certification may be inaccurate).

Here, the record establishes that FMQA did not identify in its proposal or revised proposals an arrangement with a gynecologist, and that HCFA recognized the absence of a gynecologist in its evaluation of FMQA's proposal.[16] Because the applicable regulations and RFP do not define what medical specialties are contemplated by the requirement for one physician in "every generally recognized specialty," we asked the parties to advise us of their understanding of this requirement. We also advised the parties that, from our review of FMQA's and FPRO's proposals, the medical specialties represented were not co-extensive; for example, FPRO offered a gynecologist/obstetrician while FMQA did not,

[16]Despite HCFA's recognition that FMQA's proposal did not show an arrangement with a gynecologist, the agency did not inform FMQA of this discrepancy during discussions, although this deficiency would appear to be easily correctable. Rather, HCFA states that from the information presented in FMQA's proposal the agency reasonably "inferred that FMQA had ready access to a gynecologist" and that this satisfied the purposes of the physician-access requirements.

and FMQA offered a cardiologist, oncologist and endocrinologist while FPRO did not.

The parties do not agree on what is meant by the regulatory requirement for a physician in "every generally recognized specialty." HCFA states that it "does not have, nor is [it] aware of, a list of medical specialties that are 'generally recognized specialties'" and that there is no common understanding of what would be considered generally recognized medical specialties. Nevertheless, HCFA argues that certain specialties, including gynecology, cardiology and oncology, were considered important to the agency[17] and these specialties were identified to the agency's technical evaluators in internal evaluation worksheets; these specialties were not identified to the offerors, however.

In contrast, FPRO argues that the term "generally recognized specialties" has been "consistently" interpreted by HCFA and the medical community "to mean specialties for which 'General Certificates' are issued by [member boards of] the American Board of Medical Specialties (ABMS)." In support of this argument, FPRO cites HCFA's regulation governing "Prospective Payment Systems for Inpatient Hospital Services," which identifies specialists on hospital staff by reference to specialists certified by the ABMS.[18] See 42 C.F.R. § 412.96(c)(3)(i). Under FPRO's argued-for interpretation, there are 38 generally recognized specialties, of which "gynecology and obstetrics" is one; cardiology, oncology and endocrinology are "subspecialties" under the medical specialty "internal medicine," a specialty which both FMQA and FPRO offered. Nevertheless, there

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[17]The 14 "specialties" identified in the agency's internal evaluation papers are ophthalmology, radiology, rehabilitation, neurology, orthopedics, gynecology, oncology, urology, rheumatology, cardiology, internal medicine, psychiatry, gerontology, and pulmonary medicine.

[18]Not only do HCFA's regulations governing the prospective medicare payment system for in-patient hospital care refer to the ABMS certification in defining which doctors qualify as specialists, but the RFP provides in the statement of work that:

> "[w]here possible, all physician reviewers who are doctors of medicine or osteopathy should be certified by specialty boards recognized by the [ABMS] or by a specialty board under the auspices of the American Osteopathic Association. The physician reviewer's specialty and practice setting should be the same as that of the physician under review."

are specialties for which the ABMS member boards offer certificates that neither FPRO or FMQA offered specialists for, e.g., medical genetics and preventive medicine.

FMQA contends that:

> "while there are certain 'generally recognized specialties' within the medical profession, there is no definitive list of such specialties. Specialties widely, and perhaps universally, considered to be 'generally recognized specialties' would include, for example, cardiology, oncology and endocrinology and gynecology."

We conclude from the evidence presented that there is no common understanding or definition of the term "generally recognized specialty" as used in 42 C.F.R. § 462.103(b). Nevertheless, under any of the interpretations presented by the parties, gynecology is a generally recognized specialty. Accordingly, it would appear from the information presented in FMQA's proposal that the awardee's certificate of eligibility as a physician-access organization may not be accurate; indeed, as stated above, an HCFA evaluator, using an internal agency worksheet designating what were regarded to be important medical specialties, expressly noted this omission and brought it to the contracting officer's attention. Under these circumstances, the agency could not reasonably, automatically accept FMQA's eligibility certificate without determining whether the firm had arrangements, which made available to it at least one physician in every generally recognized specialty, as required by the regulations and the RFP.[19]

FPRO argues that, if HCFA had investigated FMQA's certification, it would have found that FMQA was not an eligible physician-access organization for three reasons: (1) FMQA does not have written commitments with physician reviewers which FPRO alleges are required under the Act and regulations; (2) FMQA did not have arrangements with the 300 to 400 physicians that FPRO alleges will be required to perform the peer review contract in Florida; and (3) FMQA does not have available to it a physician in "every generally recognized specialty," as evidenced by the firm's failure to have an arrangement with a gynecologist at the time of award. In reviewing a challenge to an agency's evaluation of proposals, we will not evaluate proposals

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[19]In contrast, we note that the agency properly did investigate FPRO's claimed physician-sponsored certification because the proposal suggested that FPRO may not have the claimed status.

anew, but instead will examine the agency's evaluation and procurement decisions to ensure that they are reasonable, and in accordance with applicable laws, regulations and the stated solicitation requirements and criteria.[20] Abt Assocs. Inc., B-237060.2, Feb. 26, 1990, 90-1 CPD ¶ 223.

2. Written Commitments

FPRO argues that the physician reviewer arrangements required by the Act and regulations must be written commitments. FPRO asserts that it is the "industry practice" for potential peer review organizations to obtain written statements of intent from potential physician reviewers before contract award. In support of this argument, FPRO contends that the agency required offerors to have "sufficient reviewers lined-up and ready, e.g., Letters of Intent" and that this demonstrates that the required arrangements must be written commitments.

HCFA and FMQA dispute FPRO's contentions regarding the requirement for written commitments from physician reviewers. The agency argues that the language of the Act and regulations--that a physician-access organization must have the services of physicians available to it "by arrangement or otherwise," 42 U.S.C. § 1320c-1(1)(A); 42 C.F.R. § 462.103(a)--requires nothing more than an understanding or informal agreement with physicians by which the physicians' services will be available to the contractor. In this regard, HCFA states that historically the agency has not required a showing of written commitments with physician reviewers to qualify as a physician-access organization. FMQA asserts that:

> "it is common when a [peer review organization] is bidding for a contract for peer review, the [peer review organization] has oral arrangements with physician advisors, who are interested in performing reviews for the [peer review organization] if the [contract] is awarded."

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[20]This standard of review comports with the court's standard that provides deference to the decisions of procurement officials; an agency's procurement decision will only be disturbed where it involves "a clear and prejudicial violation of applicable statutes or regulations" or "had no rational basis." See Irvin Indus., Canada, Ltd. v. United States Air Force, 924 F.2d 1068 (D.C. Cir. 1990); Delta Data Sys. Corp. v. United States, 744 F.2d 197 (D.C. Cir. 1984).

We do not agree with FPRO that the "arrangements" with physician reviewers contemplated by the Act, regulations and RFP must be written commitments. The plain language of the Act and regulations supports the agency's interpretation that the "arrangements or otherwise" under which physicians would be available to perform peer review services need not be formal, written commitments, but can be informal in nature. In this regard, HCFA stated in explaining its final rule in response to a request that the proposed rule be modified to require formal contracts with physician reviewers:

> "[w]e believe a requirement for a contractual arrangement with physicians would result in a vague and unenforceable process essentially redundant to the requirement in § 462.103 that specifies that a [peer review organization] must have available to it continuously throughout the contract period, sufficient physician resources to perform its required review activity." 49 Fed. Reg. 7203 (1984).

There is no indication of specific contrary congressional intent regarding the form of the arrangements with physician reviewers and no showing that HCFA's interpretation of this requirement is unreasonable.[21]

FPRO nevertheless asserts that because during discussions the agency requested that offerors identify in their start-up and implementation plan whether they had sufficient physician reviewers "lined-up and ready, e.g., Letters of Intent," this indicated that written commitments were required to establish eligibility. This question did not, as FPRO asserts, require that offerors have obtained letters of intent from their potential physician reviewers; rather, it only identified letters of intent as one means of having physicians "lined-up and ready" in order to have an optimal start-up plan, which the agency would then consider in the

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[21]We also note that while FPRO contends that it had written statements of intent from its offered physician reviewers, the record shows that many of these written arrangements consisted of nothing more than postcards that potential physician reviewers returned to FPRO that indicated that the physician was "interested in learning about becoming a [peer review organization] physician reviewer" and "endorse[d] the [Florida Medical Association] in cooperation with [Keystone] to become the HCFA-designated peer review organization for Florida." This supports the agency's view that the arrangements with potential physician reviewers need only be an informal understanding that the physician would be available to perform peer review services.

evaluation as a tie-breaker. We do not understand the question to impose a written commitment requirement on offerors to establish eligibility.

3. Number of Physician Reviewers and Specialties

In FPRO's view, the eligibility requirements as implemented by HCFA's regulations include whether the organization has available to it the services of a sufficient number of licensed physicians to assure adequate peer review services. FPRO argues that FMQA did not have arrangements with the 300 to 400 physicians that FPRO alleges will be required to perform the peer review contract in Florida.

HCFA contends that to satisfy the minimum eligibility requirements a potential physician-access organization need only show that it has available at least one physician in every generally recognized specialty. The plain language of the applicable regulation supports this view. Specifically, 42 C.F.R. § 462.103(a)(1) restates the statutory requirement that physician-access organizations have available to it the services of a sufficient number of physician reviewers; the regulation at 42 C.F.R. § 462.103(b) then provides that to satisfy this requirement, an organization must demonstrate only that it has available to it "by arrangement" at least one physician in every generally recognized specialty who would conduct reviews for the organization. This interpretation is also supported in the agency's comments on this final regulation as follows:

> "[t]he requirement of one physician per specialty represents the minimum acceptable standard [to be a physician-access organization]. In its proposal to be a [peer review organization], the organization must also substantiate the availability of sufficient physician resources to conduct all of its required review activities and to achieve all of the objectives contained in the contract. Therefore, we believe the standard of at least one physician in every generally recognized specialty is sufficient." 49 Fed. Reg. 7203.

While FPRO disagrees with the agency's interpretation of this regulation, it has not shown that the agency's interpretation is unreasonable or is inconsistent with the requirements of the Peer Review Improvement Act.[22]

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[22]FPRO's argument that FMQA has an insufficient number of physician reviewers to successfully perform the contract does not go the firm's eligibility, but concerns a general matter of affirmative responsibility. Agency affirmative

The question remaining is whether FMQA had available to it a physician in "every generally recognized specialty." FPRO argues that FMQA did not, as evidenced by the firm's failure to have an arrangement with a gynecologist at the time of award. FMQA admits that its proposals did not indicate an arrangement with a gynecologist. Nevertheless, FMQA contends, in affidavits submitted to GAO during our consideration of this matter, that prior to the submission of its initial proposal FMQA had made an arrangement with a board-certified gynecologist to perform review work, and that this gynecologist is currently performing review work for FMQA on this contract. FMQA has also provided to our Office a letter of support for FMQA signed by the gynecologist and bearing a date prior to the submission of FMQA's initial proposal, which substantiates the arrangement between the awardee and gynecologist. FPRO argues that no weight should be given to the sworn statements of FMQA's medical director and gynecologist, which attest to an arrangement by which the gynecologist agreed to perform peer review services for FMQA; FPRO contends that there is no contemporaneous evidence supporting this alleged arrangement.

We have no reason to disregard the sworn statements of FMQA's medical director and the gynecologist as FPRO suggests, notwithstanding that apart from these statements and the gynecologist's letter of support there is no other evidence in the record corroborating the alleged arrangement between FMQA and the gynecologist.[23] FPRO only first identified FMQA's omission of an arrangement with a gynecologist in its September 13 submission to our Office, and it was this late argument that caused us to request the parties to address this allegation. In the absence of contradictory direct evidence, we find that FMQA's sworn statements and the contemporaneous support letter is evidence that FMQA had an arrangement with a gynecologist at the time of award.

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determinations of responsibility are not subject to question, absent fraud or bad faith, given the large measure of subjective judgments involved in making such determinations. 4 C.F.R. § 21.3(m); see Applications Research Corp. v. Naval Air Development Center, 752 F. Supp. 660, 682 (E.D. Pa. 1990). Also, we note that HCFA reports that it has audited FMQA's on-going performance, and FMQA has an adequate number of physician reviewers and is successfully performing the contract.

[23]Of course, the agency neglected to inform FMQA during discussions of the omission of an arrangement with a gynecologist, a deficiency that appears to us to be easily correctable.

In any case, it does not appear that FPRO was prejudiced by the agency's acceptance of FMQA as a physician-access organization, because it is not clear that FPRO was eligible as either a physician-sponsored or physician-access organization. Under any of the interpretations presented by the parties, FPRO does not appear to satisfy the requirement that an eligible physician-access organization have available at least one physician in every generally recognized specialty. Specifically, under the agency's and FMQA's interpretations, cardiology and oncology are considered medical specialties, and FPRO's proposal failed to show arrangements with a physician in these specialties. Under FPRO's own argued-for interpretation--that the required medical specialties refers to specialties certified by one of the member boards of the ABMS[24]--neither FPRO or FMQA provided arrangements with physicians in every specialty certified by the ABMS member boards, e.g., "diagnostic radiology"[25] and "public health and general preventive medicine."

Prejudice is an essential element of every viable protest, and GAO will not recommend disturbing an agency's procurement decision absent the existence of possible prejudice. Tektronix, Inc., B-244958; B-244958.2, Dec. 5, 1991, 91-2 CPD ¶ 516. This standard comports with the court's standard of review. See Irvin Indus., Canada Ltd. v. United States Air Force, 924 F.2d at 1072. Not only is it questionable from the record whether FPRO had "physician-access organization" status as of the date of award, but FPRO does not argue that the agency's alleged waiver of the eligibility requirement for FMQA affected either the offerors' proposed costs/fees or the offerors' technical

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[24]FPRO's discounts its proposal's failure to reference arrangements with cardiologists, oncologists, and endocrinologists because these are certified by the ABMS as subspecialties of the internal medicine specialty.

[25]When the fact that FPRO did not propose all ABMS specialties was noted by HCFA in response to this FPRO definition of "generally recognized specialties," FPRO argued that those specialties certified by the member boards of the ABMS that FPRO did not mention in its proposal are specialties that would not be required by a peer review organization in performing medicare peer review services in Florida. Not only is this new argument inconsistent with FPRO's assertion that the ABMS list of specialties is the understood definition of "every generally recognized specialty" [emphasis added] as meant in the agency regulation, but FPRO admits that some of the ABMS specialties not mentioned in its proposal are relevant to this work, e.g., "diagnostic radiology."

evaluation scores. Moreover, the record shows that any failure of the offerors to have arrangements with at least one physician in every generally recognized specialty was readily correctable had the matter been brought to their attention during discussions. Finally, the record shows that FMQA currently has arrangements with several gynecologists that are performing review services for it, and that FMQA is satisfactorily performing the Florida peer review contract.

COST ISSUES

FPRO also complains that HCFA unreasonably evaluated the offerors' proposed costs. FPRO argues that its BAFO proposed costs would have been lower than FMQA's BAFO proposed costs if the agency had evaluated FPRO's proposed "cost savings" in the form of two cost credits: first, that "[i]f FPRO is awarded the [Florida peer review] contract, [Keystone] (FPRO's principal stockholder) will agree to reduce its bid for the Pennsylvania contract by $1,194,012";[26] and second, that "a [cost] savings of $406,971 could be realized by combining the computer systems for the Pennsylvania and Florida contracts." FPRO also contends that its BAFO proposed costs would have been lower if the agency had provided FPRO with government-owned equipment that FMQA proposed to use in the performance of the Florida peer review contract.

HCFA has responded in detail to each of FPRO's allegations and FPRO has not rebutted the agency's explanations. Specifically, the agency states that while Keystone was awarded the Pennsylvania peer review contract prior to the submission of FPRO's BAFO for the Florida peer review procurement, FPRO made no firm commitment to reduce or cap its proposed costs by the alleged cost savings possible through the award of the Pennsylvania contract. Rather, the agency notes that FPRO merely stated in its BAFO its willingness to further negotiate possible cost reductions. Given FPRO's failure to commit to cost savings in its BAFO or even to explain how FPRO and Keystone, two separate corporate entities, would allocate their respective costs in accordance with government cost accounting requirements, the agency reasonably ignored FPRO's suggested possible cost reductions. See Purvis Sys., Inc., 71 Comp. Gen. 203 (1992), 92-1 CPD ¶ 132.

Regarding the availability of government-owned equipment for the Florida peer review contract, HCFA admits that it did

[26]Keystone was awarded the Pennsylvania peer review contract on or about April 1, 1993, and FPRO submitted its BAFO on this RFP on June 1.

not inform FPRO of the availability of such equipment that FMQA proposed. Nevertheless, the agency states that the value of that property is only $100,963 and would have had no effect on the relative cost standing of the two offerors since FMQA's proposed BAFO costs and fee were substantially lower than FPRO's. In this regard, FMQA's proposed BAFO costs were more than [deleted] lower than FPRO's while FMQA's proposed BAFO fee was more than [deleted] lower than FPRO's proposed fee.

We see no basis to challenge the agency's evaluation of the offerors' proposed costs.[27] The agency's explanations for its refusal to credit FPRO's proposal with the alleged "cost savings" appear reasonable and supported by the record, and FPRO did not respond to the agency's explanations. While the agency apparently did not treat the offerors equally in their access to government-owned equipment, the record shows that this had no effect on the offerors' relative cost standing, given FMQA's significantly lower proposed costs/fee. See Pan Am World Servs., Inc.; Base Maint. Support Group; Holmer & Narver Servs., Inc., B-231840 et al., Nov. 7, 1988, 88-2 CPD ¶ 446.

FMQA'S ALLEGED COMPETITIVE ADVANTAGE

FPRO also complains that it was not treated fairly, honestly or on an equal basis with FMQA because HCFA allowed FMQA to compete for award of the Florida peer review contract, notwithstanding that FMQA's parent corporation, AQAF, had performed interim peer review services in Florida. FPRO contends that allowing FMQA to compete for award under these circumstances was a violation of federal common law.

We see no merit to FPRO's argument that FPRO was treated unfairly or unequally because FMQA was allowed to compete

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[27]FPRO also speculated that FMQA may not have an adequate accounting system or may have "included an overhead rate" that was unreasonably low. The agency and FMQA denied FPRO's vague allegations, and in this regard, the record shows that the agency conducted a pre-award audit of FMQA's estimating and accounting system, and found it to be adequate and most of FMQA's proposed costs to be reasonable. Despite having access to the entire administrative record, including FMQA's proposals, FPRO did not identify what was deficient in the agency's consideration of FMQA's accounting system or what rate or rates FPRO considered unreasonably low. Since FPRO did not amplify this allegation in any of its court pleadings after the filing of the complaint or in argument to us during our consideration of this matter, we see no basis to question these aspects of the agency's evaluation of FMQA's proposed costs or accounting system.

for award. There is no requirement that the government equalize competition with respect to the advantage that an incumbent contractor may have, or to exclude an incumbent from the competition, as long as that advantage does not result from unfair action by the government. Nuclear Metals, Inc., 64 Comp. Gen. 290 (1985), 85-1 CPD ¶ 217; National Credit Union Admin.; Schreiner Legge & Co.--Recon., B-244680.2; B-244680.3, Apr. 1, 1992, 92-1 CPD ¶ 329. Here, FPRO does not identify any law or regulation that would prohibit FMQA or its parent corporation from competing for award, nor does FPRO state what unfair advantage, if any, FMQA had by reason of its parent corporation's performance of the interim work. Moreover, as noted above, FPRO was expressly advised, in response to its query, of FMQA's eligibility to compete shortly after the RFP was issued, but did not protest at that time. Under our Bid Protest Regulations, such a protest would be considered untimely. 4 C.F.R. § 21.2(a)(1); see Test Sys. Assocs., Inc., B-244007.4; B-244007.5, May 1, 1992, 92-1 CPD ¶ 408.

CONCLUSION

From our review of this record, we have no basis to question the agency's evaluation of FMQA's or FPRO's proposals or the agency award of a contract to FMQA.

Robert P. Murphy
Acting General Counsel